

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 14 1993 OFFICE OF AIR AND RADIATION

MEMORANDUM

SUBJECT: CIVIL PENALTY POLICY FOR ADMINISTRATIVE HEARINGS

FROM: Mary T. Smith, Director (Signature)
Field Operations and Support Division

TO: Field Operations and Support Divisions Personnel

This memorandum describes the civil penalty policy for five separate areas of enforcement administered by the Field Operations and Support Division (FOSD). Enforcement categories included are volatility, tampering and defeat device, unleaded gasoline, section 211(f) violations, and lead phasedown. These policies follow the guidelines of the Agency's Policy on Civil Penalties and A Framework for Statute-Specific Approaches to Penalty Assessments (EPA General Enforcement Policies # GM - 21 and 22) (the "EPA Policy").

The EPA Policy establishes deterrence as the primary goal of penalty assessment. In addition, it recognizes that penalty assessment should provide for fair and equitable treatment of the regulated community and for swift resolution of environmental problems.

The EPA Policy specifies that penalties should be established and adjusted based upon a number of factors, including the gravity of the violation and economic benefit to the violator; the violator's degree of cooperation and willfulness; history of noncompliance and ability to pay, and other factors unique to the case.

VOLATILITY CIVIL PENALTY POLICY FOR ADMINISTRATIVE HEARINGS

I. INTRODUCTION

This section describes the FOSD policy for determining penalties for violations of the volatility regulations for gasoline. See 40 CFR sections 80.27 and 80.28 and Appendices D, E, and F as amended at 56 FR 64704 (December 12, 1991).

Parties covered by these regulations include refiners, importers, ethanol blenders, carriers, resellers, distributors, retailers, and wholesale purchaser-consumers.

II. CALCULATING THE PENALTY

The penalty for volatility violations is based upon the magnitude of the violation (the number of gallons of gasoline which are in violation) and the severity of the violation (the degree to which the gasoline exceeds the appropriate standard), adjusted for prior violations. For certain cases where the magnitude of the violation is not known or where the penalty calculated based upon the violation's magnitude is not sufficiently large to constitute an appropriate deterrent (generally for violations found at retail outlets and wholesale purchaser-consumer facilities), the penalty is derived from a table which takes into account the severity of the violation, the history of prior violations, and the violator's business size.

A. Gravity of the Violation

Since the reduction of fuel volatility is a crucial component of the Agency's effort to control and prevent excess volatile organic compounds, all violations of the regulations will be considered serious. The severity of the violation will be a function of the amount by which the volatility of fuel (measured in pounds per square inch) exceeds the standard because the larger the excess over the standard, the greater the environmental harm.

B. History of Violations

As provided in the EPA Policy, this policy provides higher penalties for companies with prior violations of the volatility regulations. For the purposes of this policy, prior violations include any previously issued NOV where the case was not dropped, or any judicial or administrative resolution where there was not a dismissal or judgment in favor of the defendant. Previous violations will include any violation of the regulations by a particular company, regardless of the EPA region in which it occurred .

C. Business Size of the Violator

Penalties under this policy are generally calculated based upon the number of gallons of gasoline in violation. As a result, a specific adjustment to reflect the size of the violator's business is generally not necessary. A penalty which is exactly proportional to the magnitude of the violation is appropriate in most cases, and need not be adjusted for the size of the violator's business.

In those cases where the penalty is derived from a penalty table which does not reflect the gallons in violation (normally for violations found at retail outlets or wholesale purchaser-consumer facilities), penalties are different for different-sized businesses. These distinctions are appropriate because the business size of potential violators may range from very small businesses to major national corporations, and the appropriate level of penalty required to achieve deterrence will differ. For the purposes of this policy, the size of a business entity is expressed in terms of the

violator's gross income (i.e., total business revenues from the business entity which gave rise to the violation) for the prior fiscal year. When the violator is an individual, size is expressed in terms of the individual's gross income from the prior fiscal year. Where the prior fiscal year is not representative of the violator's historical business size, revenues or income from the prior three to five years and/or recent trends should be evaluated.

D. Penalty Formula

Penalties are calculated in a manner which removes the economic benefit the violator may have received from violating the volatility regulations, and in addition, includes a deterrent to discourage other violations. This policy assigns the amounts of economic benefit which are appropriate for different levels of noncompliance (Table 1). The amounts of these benefits are based upon analyses for the volatility regulations.

Table 1. Economic benefit resulting from the production of gasoline which exceeds the volatility standards. (See original for this table)

The economic benefit component (EBC) of the proposed penalty is calculated by multiplying the number of gallons of gasoline which are in violation by the appropriate economic benefit value from Table 1. The gravity component (GC) is equal to 2.0 times the economic benefit component. The penalty (P) is equal to the sum of the economic benefit and the gravity component. Thus, the proposed penalty is calculated using the following formula:

$$P = EBC + GC, \text{ where } GC = 2.0 * EBC$$

In order to reflect the history of violations, the gravity component will be increased for cases where the violator has a history of prior violations. Thus, the formula for calculating the proposed penalty for a violator who has a history of prior violations is as follows:

<u>Number of Prior Violations</u>	<u>Formula</u>
1	$P = EBC + (GC * 1.5), \text{ where } GC = 2.0 * EBC$
2	$P = EBC + (GC * 2.0), \text{ where } GC = 2.0 * EBC$
3	$P = EBC + (GC * 3.0), \text{ where } GC = 2.0 * EBC$

In certain cases, the number of gallons of gasoline in violation will be so small that the penalty calculated as described above will not constitute a sufficient deterrent to achieve the goals of the volatility regulations. For this reason, minimum proposed penalties are provided in this policy (see Table 2). The penalties from Table 2 should be used when the penalty calculated as

described above is less than the penalty derived from Table 2. In other words, the penalty should be the greater of the calculated penalty and the penalty from Table 2.

Section 211(d) of the Clean Air Act provides for a penalty of not more than \$25,000 per day of violation and the economic benefit or savings from the violation. Thus, any penalty calculated under this policy may not exceed \$25,000 per day of violation plus the economic benefit or savings from the violation.

Table 2. Minimum penalty amounts for volatility violations, adjusted for business size, gravity of the violation, and the number of prior violations. (See original for this table)

TAMPERING AND DEFEAT DEVICE CIVIL PENALTY POLICY FOR ADMINISTRATIVE HEARINGS

I. INTRODUCTION

This section describes the FOSD policy for determining penalties for violations of the anti-tampering and defeat device provisions of the Clean Air Act as amended in 1990. The tampering and the defeat device prohibitions are specified under section 203(a)(3) of the Act, 42 U.S.C. §7522(a)(3). Section 203(a) provides that the following act and the causing thereof are prohibited:

(3)(a) - for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations...prior to its sale and delivery to the ultimate purchaser, or for any such person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser.

(3)(B) - for any person to manufacture or sell, or offer to sell, or install, any part of component intended for use with, or as a part of, any motor vehicle or motor vehicle engine, where a principal effect of the part of component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations..., and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use.

A. Statutory Penalties

Tampering - Under section 205 of the Act, any manufacturer or dealer who violates the tampering prohibition, (3)(A), is subject to a civil penalty of not more than \$25,000 per violation. Any person other than a manufacturer or dealer who violates the tampering prohibition is subject to a civil penalty of not more than \$2,500 per violation. Any such violation with respect to the tampering prohibition constitutes a separate offense with respect to each motor vehicle or motor vehicle engine.

Defeat Device - Under section 205 of the Act, any person who violates the defeat device prohibition, (3)(B), is subject to a maximum civil penalty of \$2,500 per violation. Any such violation with respect to the defeat device prohibition constitutes a separate offense with respect to each part or component.

II. CALCULATING THE PROPOSED PENALTY

The proposed penalty for tampering and defeat device violations is based upon the gravity of the violation, the violator's history of noncompliance, and the size of the violator's business.

A. Gravity of the Violation

The primary concern in determining the gravity of the tampering violation or defeat device violation is the likely increase in vehicle emissions which may result from the violation. Acts of tampering with, or defeat devices which render inoperative, primary emission control systems or specified major emission control components are presumed to result in the largest increases in emissions. Therefore, under this policy, the greatest gravity (and the largest penalties) are assigned to acts of tampering or defeat devices which involve primary or specified major emission control parts. A lesser gravity (and smaller penalties) are assigned to acts of tampering or defeat devices which involve emission related parts which are presumed to cause smaller increases in emissions.

This policy also presumes that certain acts of tampering or defeat devices may operate to cause a cumulative increase in vehicle emissions. Violations involving multiple emission control parts are presumed to cause a larger increase in vehicle emissions than violations involving only one emission control part. Additionally, violations involving onboard emissions diagnostic systems ("OBD-systems") are presumed to cause a larger increase in vehicle emissions because the disabling of the OBD-systems permits a failure in the vehicle's emission control equipment or system to go undetected and unrepaired. Any excessive vehicular emissions due to such failure may persist over a longer period of time. Therefore, under this policy, the greatest gravity (and the largest penalties) is also assigned to acts of tampering or defeat devices which render inoperative multiple emission control parts or the OBD-system.

The following systems or parts are installed primarily for emission control or emission control diagnostic, and tampering with them will likely cause a large increase in emissions. Therefore, tampering with or manufacturing or selling devices which bypass or defeat these systems or parts is considered a level "A" violation.

Exhaust Gas Conversion: Catalytic Converter, Oxygen Sensor
Secondary Air Injection: Air Pump, Diverter Valve, Pulse Air Valve
Evaporative System: Evaporative Canister, Purge Valve
Exhaust Gas Recirculation System: EGR Valve, EGR Transducers, EGR

Vacuum Lines

**Onboard Emissions Diagnostic Systems: Emissions Control
Diagnostics Fuel Metering System: Electronic Control Module, Fuel
Injectors**

Tampering or defeat devices which result in only partial deactivation of the above systems or parts, tampering which involves any other system or part not listed above, or tampering which involves the replacement of existing exhaust system components where the converter had been removed previously are all considered level "B" violations.

Partial deactivation of certain emission controls, such as replacing a 3-way converter with a 2-way converter, will cause the vehicle to pollute significantly less than the total deactivation of the catalytic converter. Similarly, replacing a rusted out single or dual exhaust system on a vehicle with the converter already removed will have a minimal adverse effect on emissions, however, it is still a violation under current EPA policy. The above actions would, therefore, more appropriately be level "B" violations based on their lesser emissions impacts while the act of removing or totally deactivating a catalytic converter would be a level "A".

B. History of Prior Violations

As provided in the EPA policy, this policy also provides higher penalties for a party with a history of noncompliance with the tampering or defeat device provisions.

Where a party has previously violated the tampering or defeat device provisions, this is usually clear evidence that the party was not deterred by the Agency's enforcement action. Therefore, the penalty shall be increased, unless the previous violation was caused by factors entirely out of the control of the violator. For the purposes of this policy, prior violations include any NOV resolved where the cases was not dropped, or any judicial or administrative resolution where there was not a dismissal or judgement in favor of the defendant. Where a party operates multiple facilities, it may be difficult to determine whether a previous instance of noncompliance should trigger an increased penalty. In making this determination, FOSD shall consider who in the organization had control or oversight responsibility for the conduct resulting in the violation. In situations where the same person(s) or organizational unit had or reasonably should have had control or oversight responsibility for the violative conduct, the violation should be considered part of the compliance history of that regulated party. FOSD shall also consider whether a party changes operators or shifts responsibility for compliance to different groups as a way of avoiding penalties, and whether there is a consistent pattern of noncompliance or a corporate-wide indifference to environmental protection. In such instances, where there is a shifting of responsibility to avoid liability or a pervasive indifference to the tampering or defeat device

prohibitions, the violation should be considered part of the compliance history of that regulated party.

C. Business Size of the Violator

To create a fair and equitable deterrent, the business size or operating budget of the violator must be considered. Where the violator is a business entity (sole proprietor or corporation), size is expressed in terms of the violator's annual gross income (i.e., the total business revenues from the business entity which gave rise to the violation). A three million dollar per year annual gross income has been chosen for the line of demarcation between business sizes. Where the prior fiscal year is not representative of the violator's business size, revenues or income from the prior three to five years should be evaluated. Where the violator is a municipal violator, size is expressed in terms of the violator's operating budget. Municipalities, unlike corporations, derive their income from public revenues. In addition, only the very smallest municipalities are likely to have an operating budget below three million dollars (\$3M). Therefore, in distinguishing the size of municipalities, only those municipal violators with an annual operating budget of at least ten million dollars (\$10M) are subject to the larger penalties.

D. Penalty Calculations

Penalties are calculated in a manner which removes the economic benefit the violator may have received from violating the regulations, and in addition, includes a deterrent to discourage other violations. The tables below reflect the gravity of the violation, the history of prior violations and the business size of the violator. However, where the use of the table would formulate a penalty which would not reflect the violator's economic benefit, an amendment to the use of the table must be followed. The lowest penalty amount selected from the table that is being used to calculate the total penalty cannot be less than twice the violator's economic benefit realized for that violation.

DEFEAT DEVICE AND TAMPERING PENALTY TABLE FOR ADMINISTRATIVE HEARINGS FOR ALL VIOLATORS OTHER THAN DEALER OR MANUFACTURER VIOLATIONS OF (3)(A) (See original for this table)

SECTION (3)(A) MANUFACTURER AND DEALER TAMPERING PENALTY TABLE (See original for this table)

In some instances, a violator may have violated both the tampering and the defeat devices prohibition. Where the separate violation is an integral part of the other violations, EPA shall exercise its enforcement discretion in determining whether to merge the violations or assess a penalty for both violations.

D. Penalties for Record-keeping and Retention Violations of EPA'S Aftermarket Catalytic Converter Policy

EPA's enforcement policy of August 6, 1986 ("Policy") regarding the sale and use of aftermarket catalytic converters requires proper record-keeping and retention as a condition to the installation of aftermarket catalytic converters. Therefore, if a shop installs aftermarket catalytic converters, it is required to have proper documentation reflecting installation of such converters. The lack of such accompanying documentation will result in a violation since it is required that a new OEM catalytic converter be installed unless all requirements of the aftermarket catalytic policy are satisfied.

Nature of Violations

The types of potential record-keeping violations are as follows:

1. 1. Invoice does not include each of the following: customer's name and complete address; vehicle's make, model year and mileage; and reason for replacement.
2. 2. The repair facility does not have a signed statement by the vehicle owner and installer, or state/local program representative concerning the reason for the replacement of the catalytic converter.
3. Copies of invoices are not retained for six months.
4. The removed converter is not retained for 15 working days.
5. The removed converter is not properly marked to identify the vehicle from which it was removed.
- 6 6. Required warranty card is not filled out by installer and given to the customer (for new aftermarket converters only).

In order to compute the penalty for record-keeping and retention violations, it is necessary to determine the number of aftermarket converters that were installed that did not have accompanying proper documentation and/or were not retained as required over the previous six month period. The following data can be used to help ascertain the number of installations involved: invoices reflecting converter replacement, information supplied by an aftermarket converter supplier as to the number of converters provided to the shop, statement(s) from employee(s) or past employee(s) as to the number of converters installed, converters found at the shop unmarked, etc.

Penalty Determination

This Policy bases penalty amounts on the number of violations, gravity of the violations, size of the business, and history of

prior violations.

Violations of this type are divided into two levels:

Level 1: The records are so deficient that it cannot be determined with certainty either from the service invoice or by further investigation which installations were misapplications over the previous six month period as a result of deficiencies in certain significant requirements (e.g., owner's name and complete address; vehicle's make, model year and mileage; reason for replacement; and the warranty card completed accurately). These include the deficiencies listed in items 1, 3, and 6 above. Every record reflecting such converter work and/or every improperly labeled converter is considered a violation for purposes of the proposed penalty computation.

Level 2: The records reflect proper applications (i.e., the proper catalyst types - two-way, three-way or three-way with air - were installed). However, there is insufficient supporting data as required in the Policy, to demonstrate the converter was removed under appropriate circumstances. These include the deficiencies listed in items 2, 4, or 5 above. Every improper record-keeping violation which is documented as having occurred during the previous six months is considered a violation for purposes of the proposed penalty computation.

RECORDKEEPING AND RETENTION PENALTY TABLE
(See original for this table)

The proposed penalty amount should be determined by multiplying the number of violations by the appropriate figure from the above table. The proposed penalty can be a combination of Level 1 and Level 2 violations. Penalties for new car dealers are determined by multiplying the above calculated figure by two.

The scenario may exist where shop records indicate the purchase of aftermarket catalytic converters and/or statements from shop employees confirm the installation of such converters, but few or none of the specific installation records exist. In this situation it is impossible to determine that the installations were performed properly, since records do not exist of the installations. Therefore, the installation of aftermarket catalytic converters in this situation are essentially level 1 violations. The inspector should document through shop records and/or statements by the shop owner or employees that multiple (more than one) aftermarket catalytic converter installations have been performed by the shop.

UNLEADED GASOLINE CIVIL PENALTY POLICY FOR ADMINISTRATIVE HEARINGS

I. INTRODUCTION

This section describes the FOSD policy for determining penalties for violations of the unleaded gasoline regulations.

Pursuant to Section 211 of the Act, 40 CFR Part 80 was promulgated to regulate and control the manufacture, introduction into commerce, offering for sale, and sale of motor vehicle fuels, most specifically leaded and unleaded gasoline. See 40 CFR sections 80.21, 80.22 and 80.23 and Appendices A, B, and C. Violations of the Unleaded Gasoline Regulations fall into two office-generated categories: "major" violations and "minor" violations. Major violations include introduction (misfueling) violations, contamination violations, and nozzle violations. Minor violations include not offering unleaded gasoline violations, unleaded nozzle violations, label violations, and sign violations. Under the unleaded gasoline regulations, gasoline retailers, distributors or resellers, refiners and wholesale purchases-consumers are subject to the regulations.

A. Major Violations:

1. Introduction of Leaded Gasoline into Unleaded Vehicles

Under Section 80.22(a), gasoline retailers and wholesale purchaser-consumers are prohibited from introducing or causing or allowing the introduction of leaded gasoline into motor vehicles requiring unleaded gasoline only.

2. Contaminations of Unleaded Gasoline

Under Section 80.21(a) and (b), 80.22, and 80.23(a), refiners, reseller, distributors, carriers, retailers, and wholesale purchaser-consumers are in the chain of distribution of gasoline and are prohibited from dispensing, offering for sale, selling, storing, transferring or causing the transportation to other parties, gasoline represented to be unleaded, but which does not conform to the requirement prescribed in the regulations (maximum of .05 grams of lead per gallon and a maximum of .005 gram of phosphorous per gallon).

3. Nozzle Violations

Under Section 80.22 (f)(1) gasoline retailers and wholesale purchaser-consumers are required to equip their leaded gasoline pumps with nozzle spouts having an outside diameter of not less than 0.930 inch. This is to ensure that leaded gasoline cannot be introduced into vehicles designed for unleaded fuel only (these vehicles are equipped with a smaller diameter fuel inlet restrictor).

B. Minor Violations

Under Section 80.22, gasoline retailers and wholesale purchaser-consumers are required to offer for sale at least one grade of unleaded gasoline [§ 80.22 (b)], equip unleaded gasoline pumps with the proper nozzles [§ 80.22(f)(2)], properly label gasoline pumps [§ 80.22(e)], and post the required federal warning sign at a retail outlet or wholesale purchaser-consumer facility

[§80.22(d)].

C. Statutory Penalty

Under Section 211 (d) of the Act, a violator of any of the above fuels requirement is subject to a civil penalty of not more than \$25,000 for every day of such violation and the economic benefit or savings resulting from the violation.

II. CALCULATING THE PENALTY

The penalty for unleaded gasoline violations is calculated by adding the economic benefit to the violator as a result of the non-compliance, plus the gravity component for the violation (the dollar amount set by the Agency for deterrence). As discussed below, the economic benefit in the unleaded gasoline violations is often virtually non-existent. Therefore, the penalty is derived from a table which takes in to account the severity of the violation, the history of prior violations, and the violator's business size.

A. Economic Benefit

The economic benefit involved in unleaded gasoline violations is normally non-existent, de minimis, or incalculable. A nozzle violation without any related introduction violation does not, by itself, result in any economic gain; the same goes for label and sign violations. Introduction violations do not usually create an economic benefit because leaded gasoline is usually about the same price as unleaded regular. Benefit from a contamination violation could sometimes be quantified by the number of gallons sold at the higher unleaded price (although in many instances, leaded gasoline now has a higher price), but the requisite information to determine the amount of profit is not usually available. In addition, the price differential between leaded and unleaded has disappeared in the last few years. In many instances, the leaded gasoline has a higher cost. Therefore the economic benefit is deemed to be zero.

B. Gravity of the Violation

FOSD has chosen a penalty table to effectively encompass the wide range in gravity of the unleaded fuels violations. This table lays out either a figure for each schedule; the schedules are arranged by type of violation (most significant to least significant). The schedule also reflects the decreasing penalty amounts for these violations.

C. History of Prior Violations

As provided in the EPA Policy, this policy provides higher penalties for companies with a history of prior violations of the unleaded gasoline regulations. For the purposes of this policy, prior violations include any NOV resolved where the case was not

dropped, or any judicial or administrative resolution where there was not a dismissal or judgment in favor of the defendant. Prior violations will include previous occurrences of the same type of violations occurring in the same EPA region by a particular company.

D. Business Size of the Violator

Penalties set forth in the table are also distinguished based on the size of the violator's business. These distinctions are appropriate because the business size of potential violators may range from very small businesses to major national corporations, and the appropriate level of deterrence will differ. For the purposes of this policy, the size of a business entity is expressed in terms of the violator's gross income (i.e., total business revenues from the business entity which gave rise to the violation) for the prior fiscal year. When the violator is an individual, size is expressed in terms of the individual's gross income from the prior fiscal year. Where the prior fiscal year is not representative of the violator's historical business size, revenues or income from the prior three to five years should be evaluated.

Category I - \$0 to \$250,000

Category II - \$250,000 to \$1,000,000

Category III - \$1,000,000 to \$5,000,000

Category IV - over \$5,000,000

UNLEADED GASOLINE VIOLATIONS PENALTY TABLE

(See original for this table)

SECTION 211 (f) PENALTY POLICY FOR ADMINISTRATIVE HEARINGS

Penalty amounts for section 211 (f) violations will be derived from the Unleaded Gasoline Penalty Table. These violations will be considered to be a Schedule 2 violation. Section 211 (f) violations will follow the same policy for the business size and history of violations as the Unleaded Gasoline Penalty Policy.

LEAD USAGE AND REPORTING PENALTY POLICY FOR ADMINISTRATIVE HEARINGS

I. INTRODUCTION

This section describes the FOSD policy for determining penalties for violations of the lead usage and reporting regulations. The lead usage penalty policy is designed to recover the violator's actual economic benefit. The penalty is computed by adding the economic benefit component plus a gravity component. The gravity component will be three times the economic benefit component.

A. Penalty for False Lead Usage

On July 11, 1986 (51FR25253), EPA amended the penalty policy concerning violations of 40 CFR 80.20 to establish a lead valuation of \$0.05 per gram for use in the calculations of the penalties for violations which occurred after the end of 1985. After an analysis of historical lead values, EPA has decided that it is appropriate to use \$0.05 per gram for any violations of the lead usage regulations. Even if the \$0.05 per gram is not entirely correct all the time, EPA feels that the penalty calculations are appropriate due to the severe detrimental effects of lead on humans and the environment.

First Violation	$EC + GC = \text{Penalty, where } GC = 3 * EC$
One Prior Violation	$EC + GC * 1.5 = \text{Penalty, where } GC = 3 * EC$
Two Prior Violations	$EC + GC * 2 = \text{Penalty, where } GC = 3 * EC$
Three or more Prior Violations	$EC + GC * 3 = \text{Penalty, where } GC = 3 * EC$

B. Lead Reporting Violations

The lead phasedown regulations require a regulated party to submit quarterly reports on lead usage. A penalty of \$10,000 will be levied for each quarterly report that does not accurately reflect the lead usage during that quarter or for failure to submit a report.

Penalty = \$10,000 * A, where A = the number of reporting violations

Although the \$10,000 per reporting violation will generally be used for purposes of this policy, where deterrence or other factors require a higher penalty, the Agency reserves the right to subsequently apply the maximum \$25,000 per day civil penalty applicable to each and every day that a reporting violation exists. The date on which the incorrect report is submitted (or the date on which a report that was not submitted was due) constitutes the first day of the violation. Each day after that constitutes an additional violation subject to a maximum civil penalty of \$25,000 per day until the corrective report is filed with the Agency.

ADJUSTMENT AFTER INITIATION OF LITIGATION

Subsequent to the issuance of an administrative complaint, the opportunity remains for the parties to agree on a settlement anytime before the trial begins. Normally the minimum acceptable settlement amount after the issuance of a complaint will be no lower than the penalty set forth in the Notice of Violation. However, as set forth below, balancing other factors could raise or lower the bottom-line settlement amount to an amount different from the NOV amount. This smaller degree of mitigation after the filing of the complaint reflects the Agency's desire to have the defendant remedy the violation(s) and come into compliance as expeditiously as possible. By decreasing the mitigation as the time between issuance of the Notice of Violation and settlement increases, the Agency will begin to get defendants to agree to swift resolution of environmental

problems, one of the stated goals of the general penalty policy.

The amount of the mitigation allowed after issuance of an administrative complaint is determined through balancing several factors applicable to the particular case. Some of these factors are: willfulness, the strength of the evidence and the overall probability of winning the case, the relative severity of the violations, possible financial hardship to the defendant, the amount of government resources it will take to present the Agency's strongest possible case, the amount of the NOV penalty and such other matters as justice may require. Balancing these factors, the attorney makes a subjective determination as to the relative "worth" of the case and assigns to it the appropriate "bottom-line" post-complaint settlement figure. If the defendant does not agree to settle for an amount equal to or greater than this "bottom-line" figure, the case will proceed to trial.

In suitable circumstances, appropriate Supplemental Environmental Projects may be utilized for settlement purposes after the issuance of the administrative complaint. However, at this point in the process, it will be necessary to obtain the approval of the Presiding Officer.